Supreme Court, U.S.
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No. 97-1550

In The

Supreme Court of the United States

October Term, 1997

GUADALUPE ROJAS,

Petitioner,

v.

LAWRENCE FITCH, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Rhode Island's grant of an exemption from the payment of unemployment taxes to "a church or convention or association of churches" included in a list of numerous other exemptions which are all secular in nature, violates the Establishment Clause of the First Amendment.

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STATEMENT OF THE CASE

Petitioner Guadelupe Rojas (hereinafter "Rojas") is a former employee of The Salvation Army in Rhode Island. During the period of her employment, The Salvation Army was exempt from the payment of unemployment taxes, pursuant to R.I. Gen. Laws § 28-42-8(4)(i)(A).[1] Rhode Island's legislative scheme was formulated pursuant to the Federal Unemployment Tax Act (hereinafter "FUTA") 26 U.S.C. § 3301-3311. The latter provides a system to assist unemployed members of this country's workforce, and provides its own exemption for churches.

In addition to providing an exemption for churches and religious organizations, Rhode Island provides a laundry-list of unmistakably secular exemptions to its unemployment tax scheme, including certain types of

[1] That section exempts service performed in the employ of "[a] church or convention or association of churches . . . " from the unemployment compensation system.

domestic service (28-42-8(1)); those working for their son, daughter or spouse, or children working for their father or mother (28-42-8(2)); employment by another state, any political subdivision thereof or the United States government (28-42-8(3)); certain employment rehabilitation facilities for disabled individuals (28-42-8(4)(iii)); service performed as part of an unemployment work relief or work training program (28-42-8(4)(iv)); service performed by a patient of a hospital in the employ of a hospital (28-42-8(4)(v)); or service by an inmate of a custodial or penal institution (28-42-8(4)(vi)). Additional exemptions are listed in subsections 5, 6, 7 and 8 of R.I. Gen. Laws § 28-42-8. Other interesting exemptions are services as a golf caddy, real estate salesman, insurance broker, student or employee on a boat in certain instances. R.I. Gen. Laws § 28-42-8(9), (10), (11), (12), and (13). All in all, there are 13 broad exemptions to the payment of unemployment compensation tax found in § 28-42-8. Still other exemptions are provided in R.I. Gen. Laws § 28-42-10 (students), employees of agents and contractors of employing units (§ 28-42-11) and certain employees of governmental entities (§ 28-42-14).

In March of 1994, Rojas was terminated from her employment. She filed for unemployment benefits, which were denied since her employer had not paid into the system, per the exemption. In 1994, Rojas filed an action in the United States District Court for the District of Rhode Island against the Director, seeking a declaration that R.I. Gen. Laws § 28-42-8(4)(i) was unconstitutional, as an "establishment" of religion forbidden by the First Amendment to the Constitution of the United States, and that the provisions exempting churches from the payment

of unemployment compensation taxes violated her right to equal protection of the laws. Rojas also included a claim under Rhode Island's religious freedom guarantee, found in this State's Constitution at Article I, § 3. Later in the proceedings, Rojas joined the Secretary of the United States Department of Labor as a defendant, and the Salvation Army was allowed to intervene as a defendant.

The District Court declined to find that either the Federal or State statutes attacked violated the Establishment Clause, or the Equal Protection Clause. The District Court applied the three-prong test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and held that the exemption has a "wholly secular purpose", did not have a principle or primary effect that either advanced or inhibited religion, or that the exemption resulted in excessive entanglement between the church and the State. *Rojas v. Fitch*, 928 F. Supp. 155 (D.R.I. 1996). On appeal, the First Circuit affirmed, finding that both the federal as well as the State exemption provisions withstood constitutional scrutiny. *Rojas v. Fitch*, 127 F.3d 184 (1st Cir. 1997). Both courts correctly recognized that the overarching secular purpose advanced by the exemption scheme was the effective administration of federal and state unemployment benefits programs. 127 F.3d at 188 (Petitioner's Appendix 10)[2] 928 F. Supp. at 163 (App. 33).

During the appeal of this matter, and in her Petition, Rojas asserts that the parties submitted a Joint Stipulation of Facts to the District Court in lieu of a trial. While some

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[2] References to Petitioner's Appendix are hereinafter designated "App.".

of the facts contained in her recitation are not disputed, neither the Director nor any other Defendant agreed to the entire list of facts set forth in the Petition at pages 4 - 8. The Director submits that the facts that are properly considered as relevant to the Petition are those found in the decision of the First Circuit, and no others.

SUMMARY OF ARGUMENT

There is no reason for this Court to grant Petitioner's application for a writ of certiorari, since she has not, and cannot, point to a split in the Circuits that requires this Court's resolution. The decision of the First Circuit does not conflict with any decision of this Court, and is not in conflict with any decision of any other Circuit Court of Appeals or of any state court of last resort. Finally, the Petition should be denied, since the First Circuit correctly determined that R.I. Gen. Laws § 28-42-8(4)(i)(A) does not violate the Establishment Clause of the First Amendment to the United States Constitution.

ARGUMENT

I. THERE IS NO COMPELLING REASON TO GRANT CERTIORARI.

Rule 10 of the Supreme Court Rules provides that a writ of certiorari is a matter for judicial discretion, and will be granted *only* for compelling reasons. Rule 10 emphasizes that a petition for a writ of certiorari is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law, as Rojas does in

the instant petition. Rojas did not even attempt to demonstrate a compelling reason for this Court to undertake a review of the constitutionality of two statutes – one federal and one state. She instead leaps over that hurdle, and launches directly into her beliefs as to the constitutionality of the statute.

There is no reason for this Court to grant Petitioner's application for a writ of certiorari as the First Circuit's decision does not conflict with any decision of this Court, and is not in conflict with any decision of any other Circuit, or with a decision of any state court of last resort. The provisions at issue have been operating without excessive entanglement of church with state for some sixty years, and there is no need for this Court's review at this time. Further, the petition should be denied since the First Circuit correctly allocated the burden of proof, and correctly applied the three-part test articulated in *Lemon v. Kurtzman, supra.*

II. THE FIRST CIRCUIT CORRECTLY PLACED THE BURDEN OF PROOF, AND PROPERLY APPLIED THE THREE-PART TEST FOR ESTABLISHMENT CLAUSE CASES.

A. Rojas Bore the Burden of Proving That the Provisions of R.I. Gen. Laws § 28-42-8(4)(i)(A) Violated the Establishment Clause of the First Amendment.

It is beyond dispute that the provisions of R.I. Gen. Laws § 28-42-8(4) enjoy the presumption of constitutional validity. *Vote Choice, Inc. v. DiStefano,* 4 F.3d 26 (1st Cir. 1993); *Chestnut v. Magnusson,* 942 F.2d 820 (1st Cir. 1991);

Donahue v. Rhode Island Department of Mental Health, Retardation and Hospitals, 632 F. Supp. 1456 (D.R.I. 1986). It is incumbent to give effect, if possible, to a state statute. *United Nuclear Corp. v. Cannon*, 553 F. Supp. 1220 (D.R.I. 1982). A party challenging the constitutionality of a statute has the burden of not just proving unconstitutionality, but proving it **beyond a reasonable doubt.** *Cardi Corp. v. State*, 524 A.2d 1092 (R.I. 1987); *Giebink v. Fischer*, 709 F. Supp. 1012 (D.Colo. 1989); *Villanueva v. Carere*, 873 F. Supp. 434 (D.Colo. 1994). The Federal Courts do not sit as a "super-legislature" to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. *Griswold v. Connecticut*, 381 U.S. 479 (1965). This is in keeping with the well-settled maxim that courts are "reluctant to attribute unconstitutional motives to the States [in a First Amendment inquiry], particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute". *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983).

In a post-trial memo, Rojas raised for the first time the argument that it was for the governmental defendants to proffer evidence of a secular legislative purpose, in order to defeat her claims. This is clearly an incorrect standard. In a constitutional challenge such as this, the burden is on the challenger to prove a constitutional deficiency. The enacting body is not required to provide empirical evidence for its legislative judgment. *Rodriguez v. Secretary of Health, Education & Welfare*, 644 F.2d 918 (1st Cir. 1981); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Lemon v. Kurtzman, supra; Gilette v. U.S.*, 401 U.S. 437 (1971); *Walz v. Tax Commission*, 397 U.S. 664 (1970); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Zorach v. Clauson*, 343 U.S. 306 (1952).

As stated previously, State legislatures are presumed to have acted within their constitutional powers. *McGowan v. Maryland*, 366 U.S. 420 (1961). Rojas contends that the state should have produced empirical evidence of a secular purpose supporting the exemption, citing *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995). In *Metzl*, the defendant argued in favor of the constitutionality of a school district's observance of Good Friday as a holiday. He interposed as the statute's secular purpose the fact that it would not be cost-efficient to keep schools operating when so few students would attend. However, no evidence was produced to support this extremely fact-intensive defense. The Seventh Circuit declined to accept this argument on its face, with no support. Since the Respondents herein have offered no such fact-intensive defense, and since the *Metzl* opinion stands alone in shifting the burden of proof away from the plaintiff, it should not be considered authoritative. *See Granzeier v. Middleton*, 955 F. Supp. 741 (E.D.Ky. 1997) (declining to apply *Metzl*, since it was very fact specific and based on an inadequate factual record).

B. The Exemption Is Constitutionally Permissible.

A statute or governmental action is consistent with the Establishment Clause of the First Amendment if: (1) it has a secular legislative purpose; (2) its principal or primary effect is neither to advance nor inhibit religion; and (3) it does not foster excessive government entanglement with religion. *Lemon v. Kurtzman, supra.* This Court has refined the analysis under the first two prongs of *Lemon*,

focusing on "whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in Establishment Clause jurisprudence." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989). See also *Gonzales v. North Township of Lake County, Indiana*, 4 F.3d 1412 (7th Cir. 1993).

1. The Exemption Has a Secular Purpose.

The Court need look no further than R.I. Gen. Laws § 28-42-2 to divine a secular purpose. That section elucidates the motivation behind Rhode Island's entire unemployment compensation scheme, and it is this backdrop against which the exemptions must be viewed. Rojas continues to insist that various amendments to both federal and state statutory schemes altered the purpose of the statutes. She is confusing the purpose prong of *Lemon* with the second prong, that inquiring into the effect of the statute. The purpose of the legislation is the purpose at the time of its enactment, period. The fact that amendments may later change the way the statute is applied in no way alters the legislature's purpose in enacting the unemployment compensation scheme.

The First Circuit went so far as to find that the exemption, as currently formulated, *even after the amendments*, "still rests within the context of a variety of other exemptions, all of which share a common secular purpose." 127 F.3d at 188 (App. 10). Rojas' arguments about the lack of a specifically worded exemption for non-profit organizations more appropriately is rested, then, on the "effect" prong of *Lemon*.

Neither the District Court nor the First Circuit had any difficulty determining that the purpose of the exemption scheme was the effective administration of federal and state unemployment benefits programs. 127 F.3d at 188 (App. 10), 928 F. Supp. at 163 (App. 33). The District Court elaborated, stating that the way the exemption assisted in the administration of these programs was to exclude from coverage those workers who were not recognized as full members of the permanent and stable workforce. That court stated

> . . . the amendments reflect government's recognition of the increasing role that certain non-profit organizations have in our society as a whole and more specifically in providing members of the stable workforce. Thus, **absolutely no sectarian purpose is evinced by these statutes.** Any religious benefit that results as a consequence of this secular purpose is purely incidental. (emphasis supplied).

928 F. Supp. 163 (App. 34).

Therefore, there is no factual issue as in *Metzl*, and Rojas' argument lacks merit. In a case such as this, the Court need look only to the statute, and to the stated purposes therefore, to determine whether the enactment is constitutional.

Rojas doggedly continues to insist that because Rhode Island does not provide a broad exemption for "non-profit organizations" as such, the provisions of R.I. Gen. Laws § 28-42-8(4)(i) are therefore constitutionally impermissible. She ignores the provisions of R.I. Gen. Laws § 28-42-8(4)(iii) and (iv), which undoubtedly provide a haven for a wide array of non-profits. Further, the

remaining exemptions are all offered to groups or individuals which are clearly secular in nature. R.I. Gen. Laws § 28-42-8(1)-(3), (5)-(9); 28-42-10, 11, 14.

2. The Exemption Does Not Have A Principal Or Primary Effect That Either Advances Or Inhibits Religion.

Although Rojas' argument focused on the "purpose" prong of *Lemon*, both courts below went further, and upheld the statutory exemptions under all three prongs of that test. Under the second requirement of *Lemon*, the statute must have a "principal or primary effect . . . that neither advances nor inhibits religion." 403 U.S. at 612. The First Circuit correctly found that, although religious institutions as a whole benefitted from the tax exemptions, an incidental benefit to religion does not render invalid a statutory scheme with a valid secular purpose. That Court found that "the primary practical effect of the exemptions for religious institutions is to exclude former employees of such institutions from participating in the Rhode Island unemployment system." 127 F.3d at 189 (App. 12-13). In no way can this effect be construed as "advancing" or "favoring" religion. Thus, the exemptions stand up to this portion of the *Lemon* test.

3. The Exemption Does Not Create Unconstitutional Entanglement Between Church And State.

Rojas has never argued that excessive entanglement between church and state resulted from the exemptions. Indeed, the First Circuit merely adopted the District

Court's findings in this regard. The latter found that the exemption, rather than leading to an impermissible degree of entanglement, *Walz*, 397 U.S. at 664, lead to the exact opposite result. "Rather than promoting entanglement with religion the statutes foster the separation of church and state that the First Amendment requires." 928 F. Supp. at 165 (App. 36). The application of the exemptions removes State interference and oversight into the day-to-day operation of religious organizations that might run afoul of the Free Exercise clause. Therefore, the third component of the *Lemon* test is satisfied, and the exemption survives.

III. CONCLUSION

The Petitioner approaches this Court, seeking drastic and far-reaching relief: invalidation of an unemployment taxation and compensation provision found in both the federal and state schemes on Establishment Clause grounds. There is no split in the Circuits begging for this Court's resolution. Further, contrary to her arguments, it is Rojas who bears the burden of proving that the exemptions are unconstitutional, and that burden is heavy. Rojas submitted no empirical evidence in the Court below to support her claims of unconstitutionality. Since the law weighs in favor of the exemptions, and since they clearly do not violate any constitutional prohibition, they should be upheld.

Respectfully submitted,

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